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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

BENITO T. ESTACIO
Petitioner,

VS.

UNITED STATES OF AMERICA
Respondent.

Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals

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36 pp

QUESTION PRESENTED FOR REVIEW

Does the language of 18 U.S.C. § 1956(a)(1)(A)(i), which demands that a financial transaction charged as money laundering "involve[ ] the proceeds of specified unlawful activity," require the Government to plead and prove that the laundering act is distinct from, and subsequent to, the specified underlying criminal activity alleged to have produced the proceeds?

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No. _____

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OCTOBER TERM, 1995

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Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals

COURT OF APPEALS OPINION

The opinion of the Ninth Circuit Court of Appeals in this matter, as amended, is reported at *United States v. Estacio*, 64 F.3d 477 (9th Cir 1995).

STATEMENT OF JURISDICTION

On May 14, 1993, petitioner was convicted of conspiracy to commit bank fraud (18 U.S.C. § 371), aiding and abetting a bank fraud (18 U.S.C. § 1344), and money laundering (18 U.S.C. § 1956(a)(1)(A)(i)). Petitioner was sentenced to forty months incarceration on November 16, 1993. A timely notice of appeal was filed November 24, 1993. The Ninth Circuit Court of Appeals had jurisdiction to consider the appeal under 28 U.S.C. § 1291. That court filed its opinion affirming petitioner's convictions on August 22, 1995, denying a timely petition for rehearing

on October 31, 1995. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).[1]

STATEMENT OF THE CASE

Petitioner was an executive at an auto plaza development company in Folsom, California, controlled by Thomas DePasquale, which housed two dealerships: Love Chevrolet ("Love") and Sunset Oldsmobile ("Sunset"), both owned by DePasquale. By June of 1990 Love's Security Pacific ("Security") bank account had become increasingly overdrawn, in the sense that checks were being written on funds deposited but not yet collected in the account. Estacio acted as an intermediary between DePasquale and Security's branch manager, Mary Ann Kalbach.

The government presented evidence that between June 1990 and December 1990, Love ran very large overdrafts on its Security account. Those overdrafts, however, were maintained with the consent of the bank.[2] Kalbach eventually met with officials at Love, as well as Mr. Estacio, in November of 1990, to ask them to extinguish the running overdraft of $700,000 by November 23rd. (RT 178-179). As the government conceded in the Ninth Circuit, "[f]unds came into the account [by means of certified check] and the

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[1] The District Court for the Eastern District of California proceeded pursuant to its jurisdiction under 18 U.S.C. § 3231.

[2] In fact, as a former officer of the bank testified, the bank was reaping an enormous profit, to the tune of $10,000 a month in service fees, by permitting the overdrafts. (RT 175). Furthermore, the tolerance of the overdrafts was a conscious business decision on the part of the Security Pacific branch manager, who testified that the Love Chevrolet was "very large in our branch and probably the biggest business in Folsom. It's very important to handle that account with kid gloves and give it every benefit." (RT 211).

kite at Security Pacific disappeared on the date required . . . ." (Government Brief at 11).

In December 1990, following repayment of the $700,000 overdraft, the DePasquale businesses at Love and Sunset exchanged checks to cover large overdrafts in their business accounts, maintained at Security and Wells Fargo Banks, respectively. (RT 785-787). In January 1991, having became concerned about the continuing overdrafts as well as check transfers between Love and Sunset, Security closed Love's account and negotiated a repayment agreement. (RT 203-210, 272). It was only when Love, controlled by DePasquale, failed to satisfy its obligations under the repayment agreement that the matter was reported to federal authorities for a criminal investigation. (RT 270-271).

Estacio was charged with three categories of offenses:

(1) one count of conspiracy to commit bank fraud alleged to have run from June 1, 1990, to January 16, 1991, thus including the entire period of Love's overdrafts, including those which ended with the $700,000 deposit on November 23, 1990, and on which Security collected enormous fees;

(2) one count of aiding and abetting bank fraud, relating to the period January 2, 1991, to January 16, 1991, and thus involving only those activities allegedly designed to cover up the preceding "kiting" activity; and

(3) fourteen counts of money laundering, one for each of fourteen checks deposited by Sunset and Love alternately in Wells Fargo and Security between December 6th and 14th, 1990.

Estacio, 64 F.3d at 479.

The indictment stated that the money laundering consisted of "check kiting which involved the proceeds of a specified unlawful activity, that is, bank fraud," but did not specify what the acts of bank fraud were, what bank they involved, or when they occurred. *Id.* As the Ninth Circuit noted, "[i]t is not clear from the indictment that the conduct alleged to have constituted laundering — receipt and deposit of bad checks — was separate from the conduct charged as the underlying criminal bank fraud activity." *Id.* at 481.

On April 23, 1993, prior to the commencement of trial, counsel for appellant Estacio filed his trial brief in the district court. (District Court docket, at No. 54). In that brief, trial counsel for Estacio noted that "the government relies upon an uncharged bank fraud to create the predicate offense," and argued on the basis of *United States v. Johnson,* 971 F.2d 562 (10th Cir. 1992) and *United States v. Edgmon,* 952 F.2d 1206 (10th Cir. 1991), *cert. denied,* 120 L.Ed.2d 906 (1992), that the December check exchange could not be a legally sufficient predicate for the charged money laundering offenses:

> [I]t [is] clear that the same transaction cannot constitute both the underlying fraud offense and the crime of money laundering since Congress aimed the latter only at conduct that follows in time the underlying crime. It was not intended as an alternative means of punishing the underlying specified unlawful activity.

(Docket No. 54 at 10).

Estacio therefore asked for dismissal of the money laundering counts "on this facial challenge to the indictment." *Id.* (emphasis added). At the close of the government's case, Estacio moved for a judgment of acquittal, relying "with respect to the money laundering counts [on the] substantial argument . . . in [Estacio's] trial brief, which is

on file with this court." (RT 872). The district court denied that motion due to its mistaken impression that "the Ninth Circuit has held that the very acts which constitute the fraud can also constitute the money laundering...." RT 872-873).

In defining the elements of money laundering, the district court required the jury to find "the defendant conducted a financial transaction involving the proceeds of bank fraud." (RT 1309). It did not, however, instruct the jury that "money laundering conduct must be separate from the offense giving rise to proceeds, because money laundering aims at conduct later in time than the underlying activity." *Estacio*, 64 F.3d at 481. The jury thus was permitted to convict Estacio of money laundering by finding that the December 1990 deposits charged as the "financial transaction" element of the crime also constituted the required predicate offense of "bank fraud."

REASONS FOR GRANTING CERTIORARI

I

THE NINTH CIRCUIT'S OPINION ERRONEOUSLY PERMITS CONVICTION FOR MONEY LAUNDERING WITHOUT AN ELEMENT OF THAT OFFENSE, THAT A FINANCIAL TRANSACTION INVOLVE THE PROCEEDS OF PRIOR SPECIFIED UNLAWFUL CONDUCT, BEING PLED OR PROVEN

A. Petitioner Was Convicted Without A Necessary Element Of The Offense Being Pled Or Proven

The district court found that the government was using the December 1990 check deposits to establish both the "financial transaction" and "specified unlawful activity" elements of the charged money laundering offenses, but believed the Ninth Circuit had approved such dual use of

the same conduct. *Estacio*, relying on the legislative history of § 1956 and following *United States v. Edgmon*, 952 F.2d 1206, 1213 (10th Cir. 1991), *cert. denied*, 120 L.Ed.2d 906 (1992), correctly held that the statute does not permit that result: "money laundering conduct must be separate from the offense giving rise to proceeds, because money laundering aims at conduct later in time than the underlying activity." 64 F.3d at 481. Thus the requirement of a separate and prior predicate offense — "the underlying activity" — is plainly an element of the crime defined in 18 U.S.C. § 1956(a)(1)(A)(i).

That being so, because an indictment must plead the necessary elements of the charged offense[3] — in this case, a prior predicate offense — the indictment here was facially defective as to the money laundering counts, requiring reversal even at this belated stage of the proceedings.[4] Furthermore, because the government proved the same conduct for the predicate offense and the money laundering activity, its evidence on the former element was deficient as a matter of law. Estacio is entitled now to a judgment of acquittal on the money laundering charges.

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[3] *See United States v. Morrison*, 536 F.2d 286 (9th Cir. 1976) (when the statute is silent as to one or more elements of the offense, the indictment must nonetheless spell out those elements in order to be valid); *United States v. Opsta*, 659 F.2d 848 (8th Cir. 1981) (same).

[4] Because sufficiency is jurisdictional, failure to state an offense "shall be noticed by the court at any time" (Fed.R.Crim.P. 12(b)(2)), even on appeal by "the overwhelming weight of authority." 1 C. Wright, Federal Practice & Procedure, Criminal 2d §193 at 693 (1982); *see also United States v. Hooker*, 841 F.2d 1225, 1231-32 (4th Cir. 1988) (error is substantial, cannot be deemed harmless, and voids the conviction); *United States v. Morrison*, 536 F.2d 286 (9th Cir. 1976) (same).

B. By Failing To Reverse Estacio's Conviction, The Ninth Circuit Has Caused Confusion As To The Elements Of The Money Laundering Statute

Despite its conclusion that § 1956 requires the existence of "underlying activity" separate and prior from the charged financial transaction, the Ninth Circuit has confused this rule by affirming Estacio's conviction without what is plainly an element of the crime being pled or proven. The Circuit stated:

> There was ample evidence of check kiting, or bank fraud starting in June 1990 and continuing throughout the months preceding the December 1990 check kiting charged as money laundering. Accordingly, there existed separate underlying activity that gave rise to the proceeds charged in the indictment and Estacio suffered no prejudice as a result of any irregularities in the charging document.

64 F.3d at 481.[5] This statement is incorrect for three reasons.

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[5]The Ninth Circuit also stated that "Estacio never challenged the sufficiency of the indictment . . . and does not argue that these money laundering convictions must be overturned because of the government's failure in the indictment to describe separate unlawful activity that gave rise to the laundered proceeds." 64 F.3d at 481. After entering the case following the issuance of the Court's amended opinion, present counsel pointed out on rehearing that trial counsel indeed had challenged the sufficiency of the indictment on the money laundering counts (Docket No. 54 at 10). In the same petition for rehearing present counsel also argued for reversal on the ground that the money laundering counts had been neither sufficiently pled nor proven.

1. The Jury Was Not Instructed On, And Thus Did Not Find, The Existence Of Every Element Of The Charged Crime, As Is Constitutionally Required.

Even had there been *evidence* sufficient to support findings that there had been separate bank fraud prior to December of 1990 and that the pre-December kiting produced proceeds, to convict validly the jury had to *find* those facts proven beyond a reasonable doubt. *United States v. Gaudin*, 132 L.Ed.2d 444, 452 (1995) (This Court reaffirms "the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes the application of the law to facts."). It is beyond dispute that the jury was not instructed on these elements of the offense, and thus it is impossible to argue that jurors found proven beyond a reasonable doubt that the "proceeds" laundered in December resulted from pre-December bank fraud. "Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury." *McCormick v. United States*, 500 US 257, 270 n.8 (1991). As the Ninth Circuit itself has recognized, the failure to instruct on such elements is structural and cannot be deemed harmless. *See United States v. Gaudin*, 28 F.3d 943, 951 (9th Cir. 1994); *Harmon v. Marshall*, 57 F.3d 763, 767 (9th Cir. 1995).

2. Having Failed To Allege Pre-December Bank Fraud, Any Attempt By The Government To Rely On Such A Theory At Trial Would Constitute An Unconstitutional Amendment Of The Indictment.

The district court effectively found the indictment charged the December checking activity as both the bank fraud and laundering activity contemplated in Counts 3 to 16. The government cannot obtain a conviction on a theory different than the one on which the defendant was

indicted. *Stirone v. United States*, 361 U.S. 212 (1960). Even absent the other legal obstacles to use of pre-December checking activity to establish the predicate bank fraud, reliance on such an uncharged theory would constitute an unconstitutional constructive amendment of the indictment. *United States v. Pazsint*, 703 F.2d 420 (9th Cir. 1983) (amendment of the indictment by jury instructions that change the potential theory of liability is plain error and reversible even when no objection was made); *United States v. Stewart Clinical Laboratory, Inc.*, 652 F.2d 804 (9th Cir. 1981) (variance between indictment and proof in Medicaid fraud case requires reversal).

3. The Pre-December Checking Indisputably Created No Proceeds.

Whether the pre-November 23rd overdrafts are characterized as consensual and thus legal overdrafts or as improper "check-kiting,"[6] they had resulted in no loss to the bank nor had they produced any "proceeds" for Love Chevrolet as of the end of November, 1990, because all accounts had been reconciled as of that date. That being the case, any bank fraud (i.e., kite) committed in regard to the Love account at Security prior to the end of November, 1990, could not have served as the predicate offense or "underlying activity" to money laundering in December of 1990. Any laundering that occurred in December of 1990 necessarily had to involve "proceeds" of check-kiting that also occurred that month.

The government has conceded that any activity in Love's Security account prior to December of 1990 created no loss to the bank, nor did it create an overdraft that remained in

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[6]It was the government's theory that Love engaged in a kite by accepting checks from Sunset drawn on insufficient funds, which were deposited in its Security account, and by writing checks of a similar amount to Sunset's Wells Fargo account.

existence at the end of November, 1990. (Government's Brief at 11). The overdraft leading to the loss suffered by Security in January of 1991 began in December with the very deposits charged as money laundering. Thus, there was not "separate underlying activity that gave rise to the proceeds charged in the indictment," requiring reversal of the laundering convictions.

II

THIS COURT SHOULD ADDRESS THE ISSUE OF THE RELATIONSHIP BETWEEN THE UNDERLYING SPECIFIED UNLAWFUL ACTIVITY AND THE "FINANCIAL TRANSACTION" USED TO "PROMOTE" A "SPECIFIED UNLAWFUL ACTIVITY," BECAUSE THE CIRCUITS HAVE ISSUED CONFLICTING OPINIONS ON THE QUESTION

It is petitioner's view that while the Ninth Circuit enunciated the right principle, it reached the wrong result, thereby causing confusion as to whether separate and prior underlying activity is indeed an element of money laundering. It is also the case that the rule stated by *Estacio* regarding the relationship between the "financial transaction" and "specified criminal activity" elements of money laundering has not been uniformly applied throughout the circuits. Indeed, this area of law is badly muddled, both within the Ninth Circuit and throughout the remaining Circuits, which need direction from this Court.

The *Estacio* court, relying on *Edgmon*, stated the proper application of § 1956(a)(1)(A)(1). The statute was intended to reach "conduct that follows in time the underlying crime rather than to afford an alternative means of punishing the prior 'specified unlawful conduct.' " 64 F.3d at 481, citing *Edgmon*, 952 F.2d at 1213-14. The statute (along with § 1957) accomplished that goal by requiring proof of a financial transaction that employs "proceeds of a specified

unlawful activity." Thus, to fall within the ambit of § 1956(a)(1)(A)(1), a financial transaction must employ proceeds garnered from prior and clearly distinct criminal activity.

Along with *Edgmon* and *Estacio*, a number of courts have correctly delineated this critical aspect of the money laundering provisions. In *United States v. Johnson*, 971 F.2d 562, 569 (10th Cir. 1992), the defendant was charged with carrying out a scheme to defraud investors by inducing them to deposit money in his bank account by wire transfer. Johnson was convicted of a large number of money laundering counts pursuant to 18 U.S.C. § 1957, which like § 1956, requires a financial transaction comprised of "proceeds obtained from a criminal offense." 971 F.2d at 567.

Relying on *Edgmon* (addressing § 1956) and *United States v. Lovett*, 964 F.2d 1029 (10th Cir. 1992) (addressing § 1957), the *Johnson* court reversed the § 1957 money laundering convictions. It held that wire transfers of funds to defendant's bank account, which completed the underlying criminal offense (i.e., wire fraud), did not constitute "proceeds" until they arrived in his account. The wiring of the funds therefore could not comprise the financial transactions necessary to support the § 1957 convictions, which must occur subsequent to the creation of "proceeds" by the underlying criminal activity.

In *United States v. Heaps*, 39 F.3d 479 (4th Cir. 1994), the defendant was charged with narcotics offenses which culminated in a $2000 wire transfer into his bank account. He was also charged with § 1956(a)(1)(A)(i) money laundering. The government theorized that the deposit of the money to the bank account was a sufficient financial transaction to sustain a § 1956 conviction. The Fourth Circuit rejected this argument, holding that the $2000 wire transfer was simply the completion of the narcotics transac-

tion and could not additionally support the money laundering count. 39 F.3d at 485:[7]

> Were the payment for drugs itself held to be a transaction that promoted the unlawful activity of that same transaction virtually every sale of drugs would be an automatic money laundering violation as soon as money changed hands. Understood this way, § 1956 would have such reach that it would criminalize the very same conduct already criminalized by the drug laws.

Accord United States v. Pierro, 32 F.3d 611, 620 (1st Cir. 1994) (money laundering concerns conduct undertaken "*subsequent to*, although in connection with, underlying crime rather than merely affording an alternative means of punishing the underlying crimes.") (emphasis added); *United States v. Piervernanzi*, 23 F.3d 670, 680 (2d Cir. 1994) (contrasting § 1956(a)(2), court notes that under § 1957 "proceeds of specified unlawful activity [must] be generated" before financial transaction can comprise a criminal offense); *United States v. Lovett*, 964 F.2d 1029, 1034 (10th Cir. 1992) (same).

A number of courts, however, including the Ninth Circuit in *United States v. Montoya*, 945 F.2d 1068 (9th Cir. 1991), have taken a contrary view. In *Montoya*, the defendant, a California state senator, was convicted of accepting bribes. He was additionally convicted of money laundering under 18 U.S.C. § 1956(a)(1)(A)(i). The panel found that Montoya could be convicted of this offense as the result of his deposit of a $2000 bribe check in his personal bank account.

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[7] In so holding, the Fourth Circuit expressly rejected the reasoning of other circuits which, as noted below, have held to the contrary. *See United States v. Montoya*, 945 F.2d 1068 (9th Cir. 1991); *United States v. Cavalier*, 17 F.3d 90 (5th Cir. 1994); *United States v. Paramo*, 998 F.2d 1212 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1076 (1994).

That ruling squarely conflicts with the Ninth Circuit's decision here as well as the decisions of the First, Second, and Tenth Circuits cited above. Under these cases interpreting 18 U.S.C. § 1956(a)(1)(A)(i), until the check was deposited in his bank account or cashed, Montoya had no proceeds to launder. Only if Montoya had then withdrawn the $2000 and engaged in a financial transaction to promote the bribery scheme would this subsection of § 1956 properly have become applicable.

Similar to *Montoya*, in *United States v. Cavalier*, 17 F.3d 90 (5th Cir. 1994), the defendant was charged with mail fraud after he filed a false insurance claim regarding a van which he possessed, but which was owned by a finance company, GMAC. As the result of the false claim, the insurance company mailed a claim check to GMAC. Cavalier was charged not only with the mail fraud, but with money laundering under § 1956(a)(1)(A)(i). The Fifth Circuit sustained the § 1956 conviction, holding that the issuance of the check from the insurance company to GMAC comprised a financial transaction employing proceeds of underlying criminal conduct. 17 F.3d at 92-93.

The court's affirmance in *Cavalier*, like the decision in *Montoya*, ignores the absence of a critical element of the offense: the existence of proceeds with which to carry out a subsequent financial transaction. Had the defendant received the insurance money, and thereafter used the money to conceal his fraud or to continue the scheme, § 1956(a)(1)(A)(i) no doubt would apply. But *Cavalier* locates the laundering conduct in a transaction that at best created the proceeds of the fraud, rather than utilized extant proceeds from prior criminality, as *Johnson* and its progeny require.

Other courts similarly have misunderstood this key element of the money laundering scheme. *See United States v. Paramo*, 998 F.2d 1212, 1216-18 (3d Cir. 1993), *cert.*

denied, 114 S. Ct. 1076 (1994) (cashing of fraudulently obtained IRS refund check is sufficient to support a money laundering conviction although funds are not plowed back into illegal enterprise); *United States v. LeBlanc,* 24 F.3d 340, 346 (1st Cir. 1994) (circuit court improperly rejects downward departure granted on the fact that underlying criminal activity (i.e., gambling) was not distinct from subsequent laundering). Plainly a severe conflict exists between the circuits on this question.

CONCLUSION

The issue whether the principal federal money laundering statute has as a necessary element that the financial transaction involve proceeds from separate and prior criminal activity is one of first impression in this Court. The circuits are divided on the question, which is of recurrent and frequent importance in federal criminal prosecutions. Certiorari should be granted.

Dated: January 29, 1996

Respectfully submitted,
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Benito T. Estacio

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
BENITO T. ESTACIO,
Defendant-Appellant.

No. 93-10713.

UNITED STATES COURT OF APPEALS,
Ninth Circuit.

ARGUED AND SUBMITTED
October 5, 1994.

DECIDED
August 22, 1995.

AS AMENDED ON DENIAL OF REHEARING
October 31, 1995.

Defendant was convicted in the United States District Court for the Eastern District of California, Lawrence K. Karlton, J., of bank fraud and money laundering, and he appealed. The Court of Appeals, Schroeder, Circuit Judge, held that: (1) "proceeds" which are subject of money laundering need not always be money or tangible assets; (2) fraudulently obtained line of credit which results in artificially inflated bank balances was within scope of the term "proceeds"; (3) government established unlawful bank fraud separate from the money laundering activity; (4) failure to inform grand jurors of immunity given to witnesses could not have affected grand jury independence; and

(5) court's colloquy with jury foreman to determine status of deliberations was not coercive.

Affirmed.

1. United States 34

To prove violation of basic money laundering offense, government must establish that defendant was involved in actual or attempted financial transaction which defendant then knew involved the proceeds of unlawful activity and that he did so with the intent to promote specified unlawful activity. 18 U.S.C.A. § 1956(a)(1).

2. United States 34

"Proceeds" of unlawful activity which are the subject of money laundering offense need not consist of money or some tangible asset. 18 U.S.C.A. § 1956(a)(1).

See publication Words and Phrases for other judicial constructions and definitions.

3. United States 34

Fraudulently obtained line of credit which results in artificially inflated bank balance is within the scope of the term "proceeds" for purposes of money laundering statute. 18 U.S.C.A. § 1956(a)(1).

4. Banks and Banking 509.10

When defendant directed that deposit of checks drawn on insufficient funds, he knowingly promoted commission of bank fraud. 18 U.S.C.A. § 1344.

5. United States 34

Evidence that defendant knew and participated in bank fraud through check kiting scheme long before dates on which he made deposits which gave rise to charge of money

laundering and that he actively participated in those later kites to perpetuate the earlier fraud showed the required separate underlying unlawful activity which gave rise to the proceeds which were the subject of the charge of money laundering. 18 U.S.C.A. §§ 1344, 1956(a)(1).

6. Grand Jury 36.8

Government is under no obligation to present exculpatory evidence in grand jury proceeding.

7. Indictment and Information 144.1(3)

Grand jury's knowledge or lack of knowledge of government witness' immunity could not have affected the grand jury's independence.

8. Criminal Law 36.6

Justice Department Guidelines with respect to giving *Miranda* rights to possible prosecutorial targets do not create enforceable rights.

9. Criminal Law 865(1)

In assessing coerciveness of supplemental instructions, court looks not only to form of jury charge but also to amount of time of deliberation following charge, total time of deliberation, and any other indicia of coerciveness or pressure.

10. Criminal Law 865(1.5)

Trial court's colloquy with jury foreman, less than one day after giving *Allen* charge, in which court asked if anymore votes had been taken and if the foreman would have some idea of where the jury was by 4:00 that afternoon was not coercive, even though jury returned unanimous verdict of guilty on all counts at 3:45 that day, where jury deliberated one and one quarter hours after the colloquy, foreman had

indicated that verdict vote was imminent at the time of the colloquy, and jury's total deliberation in the case spanned nearly four days.

11. Criminal Law 957(1)

Juror affidavits on subjective effect of trial court's statements were not admissible to prove that court's statements had been coercive.

David Alkire, Santa Monica, CA, for defendant-appellant.

Daniel S. Linhardt, Asst. U.S. Atty., Sacramento, CA, for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of California.

Before: SKOPIL, SCHROEDER, and RYMER, Circuit Judges.

SCHROEDER, Circuit Judge.

Appellant Benito Estacio appeals his conviction after jury trial on a sixteen-count indictment arising out of an elaborate check kiting scheme. The counts of conviction included one count of conspiracy to commit bank fraud (18 U.S.C. § 371), one count of aiding and abetting bank fraud (18 U.S.C. § 1344), and fourteen counts of money laundering (18 U.S.C. § 1956). The sentencing guideline range as calculated in the presentence report was 121-151 months, but the district court made a downward departure to concurrent terms of 40 months on all counts. The government does not cross-appeal.

Estacio functioned as the chief financial officer of a development company that owned several car dealerships in an automotive mall. With Estacio's knowledge, and under his direction, two dealerships conducted the check kiting at

issue in this case by exchanging bad checks drawn on each dealership's respective bank. The kite flew at its highest in December of 1990, when the two dealerships exchanged kited checks totaling nearly $1,000,000 daily. In January 1991, the kite crashed when one of the banks refused to honor a check; the other bank ultimately lost more than $3,000,000.

The unusual feature of this prosecution is that the charges against Estacio included money laundering in violation of 18 U.S.C. § 1956, a crime not usually associated with check kites. Estacio was charged with a separate crime of money laundering for each deposit that the dealerships made during the December, 1990 height of the kiting operation. We affirm all of the convictions for bank fraud and conspiracy to commit bank fraud. Estacio's contention that inflated credits in a bank account cannot constitute "proceeds of unlawful activity" within the meaning of the money laundering statute is without merit. We also reject Estacio's further contention that all of his convictions must be reversed because of the prosecutor's handling, before the grand jury, of the issue of immunity for other participants in the scheme who testified at Estacio's trial. Finally, Estacio's contention that the record reflects jury coercion by the trial court after it administered an *Allen* charge must also be rejected.

Background

In June of 1990 through January of 1991, Estacio worked as a developer and chief financial officer of Transportation Enterprise, an auto plaza service and development company headed by Thomas DePasquale. Two dealerships in the plaza, Love Chevrolet ("Love") and Sunset Oldsmobile ("Sunset"), engaged in the check kiting at issue in this case. Love had its banking account with Security Pacific Bank; Sunset banked with Wells Fargo Bank. Beginning in about June of 1990, Love's account at Security Pacific became

increasingly overdrawn. At this time it became apparent to Love's management and Estacio, who acted as an intermediary between Love's owner, DePasquale, and the manager of the Security Pacific Bank branch, that the overdrafts could not be made up.

In order to cover the checks that Love Chevrolet was writing, Love's business manager began to engage in a check swap with her counterpart at Sunset Oldsmobile. Sunset would write insufficient funds checks to Love which, when accepted for deposit, created an artificial increase in Love's balance at Security Pacific. Love, at the same time, would write checks totaling a similar amount to Sunset for deposit at Wells Fargo. The total amount of the checks to be exchanged by each dealership was termed the daily "hit." Runners from Love and Sunset met daily in a parking lot to exchange the checks and travel to their respective banks for deposit.

As the checks continued to flow between the two banks, the inflated balances in the two dealerships' accounts progressively grew. By December of that year, the dealerships exchanged close to $1,000,000 in checks each day. All of these checks were knowingly written on insufficient funds and deposited with the intent to defraud the banks. The evidence showed that Estacio directed the amount of the checks exchanged, assisted by a computer program that showed the status of the Security Pacific account on a daily basis.

While the kite was airborne, the device of exchanging checks totaling approximately matching amounts ensured that neither account became more overdrawn than the other. Until mid-January of 1991, the two banks displayed what in hindsight seems surprising tolerance for the transactions. Then, on January 8, 1991, Wells Fargo refused to honor one of Love's checks, drawn on the Security Pacific account. The check kiting scheme came crashing to the

ground with the resultant multi-million dollar loss to Security Pacific. Estacio was indicted after DePasquale pled guilty. His trial proceeded on the basis of a second superseding indictment, the terms of which are important to the issues raised in this appeal.

Count One of the indictment alleged a conspiracy to commit bank fraud in violation of 18 U.S.C. §§ 371 and 1344. The government alleged that the conspiracy began about June 1, 1990 and continued through January 16, 1991. The conspiracy therefore included the entire period during which the kiting took place as well as the post-crash period in which Estacio allegedly engaged in cover-up activity.

Count Two of the indictment alleged aiding and abetting the commission of bank fraud in violation of 18 U.S.C. §§ 2 and 1344. That count related only to the period from about January 2, 1991 through January 16, 1991, and included alleged activities designed to cover up DePasquale's and Estacio's involvement in what Security Pacific, by then, knew had been a kite.

Counts Three through Sixteen of the indictment alleged separate incidents of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and aiding and abetting money laundering in violation of 18 U.S.C. § 2. In relevant part, the indictment on these counts alleged as follows:

> BENITO T. ESTACIO engaged in check kiting which involved the proceeds of a specified unlawful activity, that is, bank fraud, with intent to promote the carrying on of said specific unlawful activity, and that while conducting and attempting to conduct such financial transactions, knew that the property involved in the financial transaction, that is the funds obtained from

the check kite in the amounts set forth below, represented the proceeds of some form of unlawful activity.

Count	Date	Amount of Deposited Checks	Bank in Which The Deposit Was Made
3	12/6/90	$ 981,085.00	Wells Fargo Bank
4	12/6/90	$ 981,080.00	Security Pacific National
5	12/7/90	$ 866,425.68	Wells Fargo Bank
6	12/7/90	$ 855,478.00	Security Pacific National
7	12/10/90	$ 918,000.00	Wells Fargo Bank
8	12/10/90	$ 928,947.68	Security Pacific National
9	12/11/90	$ 686,041.00	Wells Fargo Bank
10	12/11/90	$ 686,041.00	Security Pacific National
11	12/12/90	$ 590,890.00	Wells Fargo Bank
12	12/12/90	$ 590,890.00	Security Pacific National
13	12/13/90	$1,008,454.29	Wells Fargo Bank
14	12/13/90	$ 979,542.00	Security Pacific National
15	12/14/90	$ 910,328.40	Wells Fargo Bank
16	12/14/90	$ 906,417.72	Security Pacific National

Estacio first contends on appeal that the check kiting did not involve "proceeds" of unlawful activities within the meaning of the money laundering statute because the kiting did not involve "real money."

Estacio also challenges the government's handling of witness immunity. During the course of trial, the trial court became concerned that government witnesses involved in the kite were testifying without immunity. The court learned that, prior to appearing before the grand jury, the witnesses had simply been told by the prosecution that they would not be prosecuted if they testified truthfully at Estacio's trial. The judge continued the trial for several days to clear the issue, and during that period the government granted complete immunity to all the prosecution witnesses who had been involved in the kite. When the trial resumed, the jury was made aware that the government witnesses were testifying under immunity. In this appeal, Estacio now claims that because the grand jury was not told that seven of the

government's witnesses were testifying under immunity, there was prosecutorial misconduct requiring the dismissal of this indictment.

A final issue on appeal pertains to jury deliberations. After the jury had deliberated for two days, it sent a note to the court indicating that it was deadlocked. The district judge administered an *Allen* charge and sent the jury out to commence further deliberations at approximately 3:30 in the afternoon. The next day, a Friday, at approximately 2:30, the judge brought the jury members back and inquired as to their progress. Estacio contends on appeal that the colloquy that took place between the court and the jury foreman at that time was coercive in light of the jury's prompt return to render a unanimous verdict of guilty on all counts.

We address each of Estacio's contentions in turn.

Money Laundering

[1] 18 U.S.C. § 1956(a)(1), originally enacted in 1986, was described in a Senate Committee Report as the "basic money laundering offense." Report 99433, 99th Cong. 2nd Sess. 9. To prove a violation under § 1956(a)(1)(A)(i), the government must establish that the defendant (1) was involved in an actual or attempted financial transaction, (2) which the defendant then knew involved the proceeds of unlawful activity, (3) with the intent to promote specified unlawful activity. 18 U.S.C. § 1956(a)(1)(A)(i).[1] Bank

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[1]Section 1956(a)(1)(A)(i) provides criminal penalties for persons who

> (a)(1) . . knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conduct[ ] or attempt[ ] to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity —
> (A)(i) with the intent to promote the carrying on of specified unlawful activity[.]

fraud is a "specified unlawful activity" for purposes of § 1956. *See* 18 U.S.C. §§ 1956(c)(7)(A) & 1961(1).

[2-4] Estacio contends that the government has not shown that he laundered the proceeds of underlying unlawful activity within the meaning of the statute. He argues that "proceeds" must always consist of money or some tangible asset. We do not agree. The statute does not define the term "proceeds." In rejecting void for vagueness challenges to the money laundering statute, however, several courts have adopted dictionary definitions that define the term broadly. *United States v. Ortiz,* 738 F.Supp. 1394, 1400 (S.D.Fla.1990); *United States v. Gleave,* 786 F.Supp. 258, 270 (W.D.N.Y.1992), *rev'd on other grounds sub nom United States v. Knoll,* 16 F.3d 1313 (2d Cir.), *cert. denied,* U.S. , 115 S.Ct. 574, 130 L.Ed.2d 490 (1994). A fraudulently obtained line of credit, which results in an artificially inflated bank balance, is within the scope of the term "proceeds" as used in § 1956. When Estacio directed the deposit of checks drawn on insufficient funds, as described in Counts 3-16 of the indictment, he unquestionably knowingly promoted the commission of bank fraud as defined in 18 U.S.C. § 371 and § 1344.

Section § 1956 requires that the government additionally prove that the defendant knowingly used the proceeds of unlawful activity in a separate financial transaction. A leading decision is *United States v. Edgmon,* 952 F.2d 1206 (10th Cir.1991), *cert. denied,* U.S. , 112 S.Ct. 3037, 120 L.Ed.2d 906 (1992), where the court said:

> Congress appears to have intended the money laundering statute to be a separate crime distinct from the underlying offense that generated the money to be laundered. The senate report on § 1956 expresses the need for a federal criminal offense aimed directly at the activity of laundering the money gained from illegal activity.

Id. at 1213, (citing Sen.R. 99-433 at 4). *Edgmon* went on to explain that money laundering conduct must be separate from the offense giving rise to proceeds, because money laundering aims at conduct later in time than the underlying activity.

> The discussion throughout the [Senate] report is of the gap in the criminal law with respect to the post-crime hiding of the illgotten gains .... Congress *aimed* the crime of money laundering *at conduct that follows in time the underlying crime rather than to afford an alternative means of punishing the prior "specified unlawful activity."* ... We find that Congress intended money laundering and the "specified unlawful activity" to be separate offenses separately punishable.

Edgmon, 952 F.2d at 1213-14 (emphasis added).

It is not clear from the indictment that the conduct alleged to have constituted laundering — receipt and deposit of bad checks — was separate from the conduct charged as the underlying criminal bank fraud activity. Estacio never challenged the sufficiency of the indictment, however, and does not argue that these money laundering convictions must be overturned because of the government's failure in the indictment to describe separate unlawful activity that gave rise to the laundered proceeds. This is understandable, for the record is abundantly clear that the deficiency in the indictment did not prejudice Estacio.

[5] The government's actual theory was that Estacio knew and participated in the bank fraud long before December, and that he actively participated in the December kites to perpetuate the earlier fraud. There was ample evidence of check kiting, or bank fraud, starting in June 1990 and continuing throughout the months preceding the December 1990 check kiting charged as money laundering. Accordingly, there existed separate underlying unlawful activity

that gave rise to the proceeds charged in the indictment and Estacio suffered no prejudice as a result of any irregularities in the charging document.

The December deposits could instead have been charged as bank fraud but appellant has never contended that the money laundering statute is inapplicable to conduct that was, prior to the Act's passage, already subject to criminal penalties. *See* Jimmy Gurule, *The Money Laundering Control Act of 1986: Creating A New Federal Offense Or Merely Affording Federal Prosecutors An Alternative Means of Punishing Specified Unlawful Activity?*, 32 Am.Crim.L.Rev. 823 (1995). The district court was never given any opportunity to order the government to cure any error in the indictment. The money laundering convictions must therefore be affirmed.

Alleged Prosecutorial Misconduct

Estacio argues that because the grand jury was not told that seven of the government's witnesses testified under what was effectively a grant of immunity, the government presented the witnesses in such a "false light" as to constitute prosecutorial misconduct requiring dismissal of the indictment as to all charges.

[6, 7] If appellant's argument is to succeed, we must be able to conclude "that the grand jury's independence was so undermined that it could not make an informed and unbiased determination of probable cause." *United States v. Sears, Roebuck & Co., Inc.*, 719 F.2d 1386, 1392 (9th Cir.1983), *cert. denied*, 465 U.S. 1079, 104 S.Ct. 1441, 79 L.Ed.2d 762 (1984). The government is under no obligation to present exculpatory evidence in a grand jury proceeding. *See United States v. Williams*, 504 U.S. 36, 50-56, 112 S.Ct. 1735, 1744-46, 118 L.Ed.2d 352 (1992). In this case, knowledge or lack of knowledge of government witness immunity could not have affected grand jury independence.

[8] Estacio also contends that the witnesses' rights were violated by the prosecutor's failure to follow the provisions of the Department of Justice Manual that require the giving of *Miranda* rights to possible prosecutorial targets. Estacio's standing to raise violations of Justice Department policy affecting the grand jury witnesses is unclear. We need not discuss the issue for we have noted that reliance on Justice Department Guidelines does not create enforceable rights. *United States v. Busher,* 817 F.2d 1409, 1411 (9th Cir.1987). Although the doubtful immunity status of the witnesses arose during the defendant's trial, the district court took prompt action to correct the situation and the petit jury convicted Estacio with full knowledge of the witnesses' immunity status. Defendant's rights were not affected.

Juror Coercion

Estacio claims that the colloquy between the trial court and the jury foreman at approximately 2:30 on Friday afternoon, the day after an *Allen* charge was given, was impermissibly coercive. The colloquy included the following:

> The Court: Can you tell me, have you reached any verdicts at all at this point?
>
> The Foreman: No, sir. We haven't taken another verdict test at all. We are just about ready to.
>
> The Court: I'm sorry. I got you too early.
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> The Foreman: We were getting all our stuff together.
>
> The Court: Okay. Let me ask you this: I have an appointment that I have to make at 5:00 this afternoon. So if I bring you back by four, will you have some idea where you are?

The Foreman: Yes, sir.

The Court: Okay. Why don't we do that, then. We'll see you at 4:00.

The jury rendered its unanimous verdict of guilty on all counts at 3:45 that day.

[9-11] In assessing the coerciveness of supplemental instructions, we look not only to the form of the jury charge, but also to the amount of time of deliberation following the charge, the total time of deliberation, and any other indicia of coerciveness or pressure. *See United States v. Cuozzo,* 962 F.2d 945, 951 (9th Cir.), *cert. denied,* U.S. , 113 S.Ct. 475, 121 L.Ed.2d 381 (1992). Here, the jury's one and one-quarter hour deliberation after the colloquy, considered in light of the jury foreman's statement indicating the imminence of a verdict vote at the time of the colloquy, does not give rise to any presumption of coercion. The jury's total deliberation in the case spanned nearly four days. Defense counsel's failure to object to the judge's comments at the time of the colloquy "indicates that the potential for coercion argued now was not apparent to one on the spot." *Lowenfield v. Phelps,* 484 U.S. 231, 240, 108 S.Ct. 546, 552, 98 L.Ed.2d 568 (1988). The juror affidavits on the subjective effect of the judge's statements are inadmissible. *Rinehart v. Wedge,* 943 F.2d 1158, 1160 (9th Cir. 1991) (per curiam); *see also United States v. Maree,* 934 F.2d 196, 201 (9th Cir. 1991).

We conclude that the judge's comments do not suggest impermissible coercion, much less any coercion rising to the level of plain error.

AFFIRMED.

STATUTE

§ 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity —

(A)(i) with the intent to promote the carrying on of specified unlawful activity; . . .